

Comment

The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in *DeShaney v. Winnebago County Department of Social Services*

I. INTRODUCTION

Section 1983 of the Civil Rights Acts establishes a cause of action for violations of constitutional rights.¹ As it originated in the Ku Klux Klan Act of 1871, the purpose of the Civil Rights Act was to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the . . . rights . . . guaranteed by the Fourteenth Amendment might be denied by state agencies."² Since section 1983's modern rebirth in *Monroe v. Pape*, neglect, or inaction by state agencies has increasingly become a center of debate among the federal courts of appeals.³ Much of the confusion has stemmed from the statutory requirement that the defending party has acted "under color of" law.⁴ When the defendant is allegedly a state actor, the Court has construed this language to require conduct equivalent to that constituting "state action" in fourteenth amendment equal protection suits.⁵ Essentially, section 1983 requires "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law."⁶

In recent years, courts have increasingly sought to establish a groundwork for holding defendants⁷ liable for their failure to act in situations which lead to a deprivation of substantive rights drawn from the fifth and fourteenth amend-

1. 17 Stat. 13 (1871) (codified as 42 U.S.C. § 1983 (1982)).

2. *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

3. See Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982).

4. Section 1983 reads:

Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

5. See Special Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986: VI. Prisoner's Rights*, 75 GEO. L.J. 1275, 1292 n.3873 (1987).

6. *United States v. Classic*, 313 U.S. 299, 326 (1941).

7. Of course, the eleventh amendment bars suits against a state or actions which essentially seek to recover money from the state. Nevertheless, this amendment does not prevent an action against individual state officials or a state's political subdivisions. The Court has specifically stated that a county, such as that named in *DeShaney v. Winnebago Co. Dep't of Social Servs.*, 489 U.S. 189 (1989), "does not occupy the same position as a State for purposes of the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 65, 67 n.12 (1974).

ments.⁸ Of special import has been the liberty interest of personal security guaranteed by substantive due process.⁹ The more active courts in this area have, by necessity, developed a basis for the defendant's liability through a "special relationship" arising from either causation or from a duty to act. Hence, a breach of this duty, or the creation of the constitutional deprivation, is grounds for relief under section 1983.¹⁰ *DeShaney v. Winnebago Co. Dep't of Social Services*¹¹ effectively put an end to this expansion of constitutional liability. This Comment will discuss the significant impact of the decision on the lower courts, its relevance to the justice system and possible alternatives the Court may use to reestablish limited liability for nonfeasance.

II. CASE ANALYSIS AND IMPACT

A. *DeShaney Analysis*

Joshua DeShaney is now a ten-year-old boy who is permanently retarded from beatings at the hand of his father.¹² Prior to the boy's permanent injury, the children's services agency was notified four times by police and emergency room personnel that DeShaney was "a prime case for child abuse."¹³ The Department of Social Services ignored the first report, placed Joshua in protective custody after the second, and then entered into a voluntary agreement releasing the boy into his father's custody.¹⁴ Over the next several months, Joshua's caseworker had contact with Joshua's family, or physicians treating his wounds, eight times. She learned that the boy was continuing to receive "suspicious injuries" and that his father had violated the voluntary agreement.¹⁵ The Department of Social Services took no action. In March 1984, Joshua was beaten so severely that "[h]is brain literally turned to mush . . . he cannot talk, has no use of his legs and only limited use of one arm."¹⁶

Joshua and his mother sued the Department under 42 United States Code section 1983. They alleged in their complaint that its failure to protect him violated the substantive component of the due process clause.¹⁷ The United States District Court for the Eastern District of Wisconsin granted summary judgment for the Department.¹⁸ The Court of Appeals for the Seventh Circuit and the United States Supreme Court affirmed.¹⁹ Justice Rehnquist, writing for

8. Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 52 U. CHI. L. REV. 1048, 1048 (1986).

9. *Ingraham v. White*, 430 U.S. 651, 673-74 (1976).

10. Nahmod, *supra* note 3, at 9; Comment, *supra* note 8, at 1052.

11. 489 U.S. 189 (1989).

12. *Id.*

13. *Id.* at 191.

14. *Id.*

15. *Id.*

16. Moss, *Must State Protect Children?: Suit Seeks to Hold Government Liable for Failure to Act*, 74 A.B.A. J. 22, 22 (July 1, 1988).

17. *DeShaney*, 489 U.S. at 193.

18. *Id.*

19. *DeShaney v. Winnebago Co. Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

the Court, supported the decision by citing a long list of cases in which "the Due Process Clauses generally confer[red] no affirmative right to governmental aid" and by holding that the only "special relationship" in which the right to governmental aid arises occurs when the victim is in governmental custody.²⁰

The Court apparently refused to reconcile the concept of "state action" with a tenable standard of care to impose upon the state in the performance of its services. Since the underlying claim was based upon the fourteenth amendment, the plaintiff's case was dependent upon a showing of state action. The requirement of "state action" in these section 1983 cases is especially unfortunate because that doctrine "protect[s] the freedom and autonomy of those who are . . . violating the rights of others."²¹ In essence, the legislature's enactment of section 1983, and the Courts' construction of it, have provided no punishment for a private actor who violates the rights of another. A person seeking redress for the denial of his or her constitutional rights may only do so against the state's agents for oppressive affirmative acts. In order to protect individualism, the Court allows a citizen no grounds for relief when a private party deprives him of equal protection or due process of law. In essence, "it protects one group by sacrificing another."²² With a duty to act, the defendant could be held liable regardless of whether the Court labeled the state's conduct as active or inactive. By rejecting the argument for a duty to act, the *DeShaney* Court's characterization of the misconduct alleged under section 1983 as state inaction "effectively decide[d] the case."²³

Justice Brennan forcefully illustrated in his dissent that the line between action and inaction clouds when comparing cases like *Youngberg v. Romeo*²⁴ and *Estelle v. Gamble*.²⁵ When the victim is in state custody there is a mandated due process duty to protect. In *DeShaney*, substantive due process afforded no protection.²⁶

In *Romeo*, the plaintiff-respondent had the mental capacity of an eighteen-month-old child, with an intelligence quotient between eight and ten, although he was thirty-three years old.²⁷ Because of his unruliness, Romeo's mother had him committed to a state mental hospital. While there, it was alleged that Romeo suffered injuries on at least sixty-three occasions,²⁸ was restrained for prolonged periods on a routine basis, and was denied appropriate treatment for his handicap.²⁹ For these reasons, his mother filed an action as his next friend under 42 U.S.C. Section 1983 claiming that the above noted instances of harm constituted a deprivation of his substantive rights under the fourteenth amendment.³⁰ While wavering somewhat on his claim to minimally adequate train-

20. 489 U.S. 195, 202.

21. Note, *More is Not Less: A Rejoinder to Professor Marshall*, 80 Nw. U.L. REV. 571, 572 (1985).

22. *Id.* at 572.

23. *DeShaney*, 489 U.S. at 204 (Brennan, J., dissenting).

24. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

25. *Estelle v. Gamble*, 429 U.S. 97 (1976).

26. *DeShaney*, 489 U.S. at 206 (Brennan, J., dissenting).

27. *Romeo*, 457 U.S. at 309.

28. *Id.* at 310.

29. *Id.* at 311.

30. *Id.* at 307.

ing,³¹ the Court, noting that personal security and "liberty from bodily restraint [have] always been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," found for Romeo.³²

In *Estelle v. Gamble*, Gamble, an inmate in a Texas prison, filed a *pro se* complaint against Estelle and other prison officials under section 1983. While working on the prison's farm, Gamble was injured when a bale of cotton (weighing 600 pounds) fell on him while he was unloading a truck.³³ While treated with a variety of muscle relaxants by the prison doctor, Gamble was repeatedly ordered back to work, and when he refused to do so because of continuing pain, was placed by guards in "administrative segregation"—the equivalent of solitary confinement.³⁴

The Court, finding for Gamble, essentially imposed a duty to provide adequate medical care because "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."³⁵ Because failure to provide care is proscribed by the eighth amendment, "indifference [whether] manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed, [r]egardless of how evidenced . . . states a cause of action under § 1983."³⁶

The *DeShaney* Court distinguished the two cases by noting that in *Youngberg* the state's duty arose from taking the victim into custody thus limiting "his freedom to act on his own behalf."³⁷ Surely that deed is no more "state action" than the agency in *DeShaney* taking a five-year-old boy, whose ability to act on his own behalf is questionable, into custody and then releasing him to an abusive parent. The Court's finding that "the most that can be said of the state functionaries in this case is that they stood by and did nothing"³⁸ had two immediate results. First, the Court effectively ducked the standard of care issue which would have required it to choose the moment and circumstances when the state was more than negligent. Articulating such a finding into a coherent standard to be followed by all discretionary officials would be a monumental task. Second, the Court limited section 1983 liability to situations where the state is the direct cause of the injury, or where the victim is in custody, thus the beneficiary of a "special relationship" duty.³⁹

31. See 457 U.S. at 316-23. While the Court called this aspect of his suit "troubling," they eventually mandated "such training as may be reasonable in light of respondent's liberty interests in safety and freedom from . . . restraints." *Id.* at 316, 322.

32. 457 U.S. at 16 (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).

33. *Estelle v. Gamble*, 429 U.S. 99 (1976).

34. *Id.* at 99-101 & n.5.

35. *Id.* at 104 (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

36. *Id.* at 104-05.

37. *DeShaney*, 489 U.S. at 200.

38. *Id.* at 202.

39. *Id.* at 193-94; see *Estelle v. Gamble*, 429 U.S. 97 (1976) (eighth amendment's prohibition on cruel and unusual punishment requires the state to provide adequate medical care to prisoners); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (due process clause mandates that the state act to ensure the safety of involuntarily committed mental patients).

B. DeShaney's Impact

The Supreme Court's decision specifically rejected the position of the Third Circuit that a noncustodial "special relationship" may give rise to a duty of the state to act, breach of which would lead to section 1983 liability.⁴⁰ By implication, it also halted similar expansion of such liability in the Fourth and Ninth circuits, which expressed in dicta that a "special relationship" did not depend upon state custody.⁴¹ The special relationship between the state and its citizens, giving rise to a duty to act, is drawn from tort theory where liability for nonfeasance was first placed upon those engaged in public callings, such as innkeepers.⁴²

As all section 1983 cases are to be read against a tort background,⁴³ the lower courts have split on how to approach suits brought against defendants for nonfeasance in a "special relationship."⁴⁴ A minority of courts state that such liability may exist when the state is the proximate cause of the harm.⁴⁵ In those cases, the plaintiff must establish a sufficiently close "causal connection between . . . [the governmental official] . . . and the alleged constitutional violation."⁴⁶ A majority of courts, however, concentrate on the concept of duty.⁴⁷ While a pleading of negligence is sufficient to satisfy the section 1983 component of a case, the Court, by partially overturning *Parratt v. Taylor*,⁴⁸ requires more than the pleading of mere negligence to establish a violation of the due process clause.⁴⁹

In *DeShaney*, the petitioners sought to establish that such a "special relationship" gave rise to the defendant's liability for breach of duty.⁵⁰ The Court specifically rejected this proposition, although it noted that its opinion in *Martinez v. California*⁵¹ laid the groundwork for the development of the "special relationship" concept with its appurtenant affirmative duty to protect.⁵² In *Martinez*, the Court was asked to address whether the government had an affirmative duty to protect a citizen from a dangerous parolee. In that case, the parolee was first committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment" and then sentenced to prison for a term of one to twenty years with a recommendation that he not be paroled.⁵³ Nevertheless, within five years, he was paroled and subsequently tortured and killed a

40. *Estate of Bailey v. County of York*, 768 F.2d 503, 510 (3d Cir. 1985).

41. Reidinger, *Why Did No One Protect This Child?*, 74 A.B.A. J. 48, 50 (Dec. 1, 1988); see, e.g., *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

42. Note, *A Theory of Negligence for Constitutional Torts*, 92 YALE L.J. 683, 696 (1983).

43. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) ("[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.").

44. Comment, *supra* note 8, at 1052.

45. *Id.*

46. *Wanger v. Bonner*, 621 F.2d 675, 679 (5th Cir. 1980).

47. Comment, *supra* note 8, at 1052.

48. 451 U.S. 527 (1981).

49. *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt*, 451 U.S. 527 (1981)); see also *Davidson v. Cannon*, 474 U.S. 344 (1986) (suggesting standard of deliberate or callous indifference).

50. *DeShaney*, 489 U.S. at 195.

51. 444 U.S. 277 (1988).

52. *DeShaney*, 489 U.S. at 195.

53. *Martinez v. California*, 444 U.S. 277, 279 (1980).

fifteen-year-old girl, the appellant's decedent.⁵⁴ According to the Fourth Circuit, the Supreme Court found that Martinez had failed to allege a cognizable claim under section 1983.⁵⁵ Rather than directly addressing the issue of whether Martinez had a constitutional right to protection under the fourteenth amendment, the Court "chose to decide the case on the narrow grounds that Martinez had failed to establish proximate cause."⁵⁶ The Court noted that the convict killed the decedent five months after his parole and "was in no sense an agent of the parole board."⁵⁷ Under these circumstances, the Court concluded, the causal connection between the action of the parolee and that of the state was too attenuated to hold the government liable.⁵⁸

The *DeShaney* Court realized, however, that the following and final paragraph of its *Martinez* opinion suggested that knowledge of the danger facing the victim may create a "special relationship" between the victim and the state:⁵⁹

Further, the parole board was not aware that appellant's decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that . . . appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.⁶⁰

In his *DeShaney* opinion, Justice Rehnquist noted that this language was read by several courts of appeals as implying that once the state learns that a third party poses a special danger to an identified victim, a special relationship arises "giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection."⁶¹

Perhaps the most well-known case using such an analysis was the Third Circuit's decision in *Estate of Bailey v. County of York*.⁶² The facts of this case are disturbingly similar to those of *DeShaney*. The victim was a five-year-old girl who was removed from her abusive home for one day by the local children's services agency and then released into her mother's custody.⁶³ Within a month, the child died from physical injuries inflicted by her mother and the mother's "paramour and cohabitant."⁶⁴ Using reasoning similar to the *DeShaney* Court's, the district court dismissed the child's father's section 1983 complaint because it found the county could only be held liable if injuries occurred "while the injured party is in the legal custody of the state" or if the person "whose affirmative conduct causes the harm is under the direct control or supervision of

54. *Id.*

55. *Jensen v. Conrad*, 747 F.2d 185, 191 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

56. *Id.*

57. *Martinez*, 444 U.S. at 285.

58. *Jensen*, 747 F.2d at 191.

59. *DeShaney*, 489 U.S. at 195.

60. *Martinez*, 444 U.S. at 285.

61. *DeShaney*, 489 U.S. at 197 n.4 (citing cases from the 1st, 3rd, 4th, 8th, 9th, and 11th circuits).

62. 768 F.2d 503 (3d Cir. 1985).

63. *Id.* at 505.

64. *Id.*

the state."⁶⁵ On appeal, the Third Circuit reversed the lower court's decision by imposing an affirmative duty of protection upon the agency. The Court of Appeals noted that the agency's awareness that a child "as distinguished from the public at large, faced a special danger . . . strengthen[ed] the argument that some sort of special relationship had been established."⁶⁶ In addition, the court intimated that the other relevant factors in finding a noncustodial special relationship were "whether the victim or the perpetrator was in legal custody at the time of or prior to the incident [or] whether the state had expressly stated its desire to provide affirmative protection to a particular class or specified individuals"⁶⁷

The Court in *DeShaney* reaffirmed the principle that the Constitution is a "charter of negative liberties" which delineates what the state may not do, rather than mandating what it must do.⁶⁸ Thus, the Court stated that "no special relationship" imposing an affirmative duty could exist outside of custody.⁶⁹ "The . . . duty to protect arises not from the State's knowledge of the individual's predicament or . . . its . . . intent to help him, but from the limitations which it has imposed on his freedom"⁷⁰

The reaction from the courts of appeals to the *DeShaney* decision has been swift. In *Philadelphia Police and Fire Association for Handicapped Children, Inc. v. City of Philadelphia*,⁷¹ the Third Circuit commented that *DeShaney's* "broad, harsh decision" overrules the Third Circuit opinion in *Estate of Bailey v. County of York* "and we are constrained by it."⁷² Likewise, the Fourth Circuit, another advocate of the "special relationship" duty, recently decided a case finding *DeShaney* "indistinguishable . . . [and] . . . dispositive."⁷³ That decision, denying section 1983 relief to the natural parents of a child voluntarily released from the custody of the state and then placed in an abusive foster home, threatens the validity of a Second Circuit decision with a similar fact pattern.⁷⁴ In essence, the *DeShaney* decision illustrates that the Constitution affords no protection for children, allowing the state to permit parents to "beat the[ir] child into a vegetable"⁷⁵

III. COMMENT AND ALTERNATIVES TO CONSTITUTIONALLY PROTECT THE INNOCENT

The Court's decision suggests that the majority has conveniently forgotten Chief Justice Marshall's famous admonition that we "must never forget that it

65. *Estate of Bailey v. County of York*, 580 F. Supp. 794, 797 (M.D. Pa. 1984).

66. *Bailey*, 768 F.2d at 510-11 (quoting *Martinez v. California*, 444 U.S. 277, 285 (1980) and *Jensen v. Conrad*, 747 F.2d 185, 195 (4th Cir. 1984)).

67. *Id.* at 509.

68. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

69. See *supra* note 20 and accompanying text.

70. *DeShaney*, 489 U.S. at 190.

71. 874 F.2d 156 (3d Cir. 1989).

72. *Id.* at 166.

73. *Milburn v. Anne Arundel Co. Dep't of Social Servs.*, 871 F.2d 474, 476 (1989).

74. *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983).

75. *Archie v. City of Racine*, 847 F.2d 1211, 1221 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

is a constitution we are expounding."⁷⁶ *DeShaney* calls into question the legitimacy and logic of a nation governed by a bureaucracy which has no constitutional duties toward its citizens unless they are in captivity.⁷⁷ It is anomalous that the governed must rely upon good faith of state agents for protection without any hope for judicial recourse.⁷⁸ In such a context, state inaction assumes a more sinister tone. The judicial protections that do exist via state custody for children or criminal prosecution of abusers are simply worthless to the victims of abuse without some state action. For instance, a "recent study of 146 battered women in Milwaukee found that 'the wives asked police officers to arrest their husbands in 82% of the incidents, but an arrest occurred in only 14% of the incidents.'"⁷⁹ The *DeShaney* Court leaves a particularly disheartening legacy to the nearly two million abused and neglected children in this country.⁸⁰ Despite its own recent proclamation, the Court has "trivialize[d] the Due Process Clause in an effort to simplify Constitutional litigation."⁸¹ Of course, *DeShaney* does not foreclose a tort claim under state law. "[States] may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act . . . They may create such a system, if they do not have it already . . ."⁸² Any tort claim in a state that lacks specific statutory authority for such an action would, of course, face the obstacle of sovereign immunity—a subject too vast for detailed analysis in this Comment.⁸³ Regardless, the Supreme Court has held that, at least, municipalities, as opposed to states, are "not entitled to the shield of . . . immunity from liability under § 1983 . . ."⁸⁴

The Supreme Court ignored the opportunity to reconcile the various courts of appeals' approaches to nonfeasance by rejecting outright the concept of non-custodial "special relationship." This would have required the Court to return to the foundation of "fairness" which dictated that the state must care for its prisoners.⁸⁵ Such a backdrop would allow for a "special relationship" giving rise to a duty to act if the government was responsible for creating the risk of harm to

76. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

77. *DeShaney*, 489 U.S. at 198-99.

78. *Cf. Escamilla v. City of Santa Ana*, 606 F. Supp. 928 (C.D. Cal. 1985), *aff'd*, 796 F.2d 266 (9th Cir. 1986) (undercover police officers have no duty to prevent a gunfight between people in a crowded bar resulting in plaintiff's mother's death); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984) ("[N]othing in the Constitution requires governmental units to act when members of the general public are imperiled . . .").

79. Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them when the Police Won't?*, 95 YALE L.J. 788, 789 n.3 (1986) (quoting Bowker, *Police Services to Battered Women — Bad or Not So Bad?*, 9 CRIM. JUST. & BEHAV. 476, 485-86 (1982)).

80. Fuller, *Child Abuse Rises*, 72 A.B.A. J. 34, 34 (Feb. 1, 1986).

81. *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

82. *DeShaney*, 489 U.S. at 203.

83. See, e.g., OH. CONST. art. 1, § 16 ("Suits may be brought against the state, in such courts and in such manner, as may be provided by law"). Section 16, art. 1, of the Ohio Constitution requires legislative consent to a waiver of sovereign immunity. Under this regime, a political subdivision of the state, "unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts." *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26, 30, 442 N.E.2d 749,749 (1982).

84. *Brandon v. Holt*, 469 U.S. 464, 472 (1985).

85. Comment, *supra* note 8, at 1054; see *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

a particular person or persons.⁸⁶ This risk creation requirement embodies the basic principles from which the Third Circuit and its compatriots derived the noncustodial "special relationship." The underlying theme of the causation cases like *Martinez* and the custody cases like *Youngberg* was that if the state, through its actions, renders someone helpless, then the state must affirmatively move to protect that person.⁸⁷ It would seem this approach would even be satisfactory to the Seventh Circuit which has been most pugnacious in its opposition to constitutional duties.⁸⁸ Nevertheless, such an approach would entail not only the concept of duty, but also a standard of care to be followed by discretionary officials.

The Court has long "been reluctant to impose any tort dut[ies] . . . out of a concern that such a requirement would unduly interfere with the exercise of discretion inherent in . . . official tasks."⁸⁹ A constitutional duty to act for the sake of a child would place a children's services agency in opposition to another substantive due process right of family integrity.⁹⁰ Fears that this conflict would result in the state "buying itself a lawsuit" were repeated in the various *DeShaney* opinions.⁹¹ Surely, if section 1983's purpose was to provide a remedy to those harmed when state agents are "unable or unwilling to enforce a state law," then such fears must be ignored to afford protection to the innocent victims of governmental incompetence.⁹²

The *DeShaney* Court suggested one possible alternative to guard against inadequate state conduct which may prevent unbridled constitutional tort suits.⁹³ This alternative, the labeling of state protective services as an entitlement may provide a workable framework in which to examine inaction cases.⁹⁴ The entitlement revolution began with *Goldberg v. Kelly*,⁹⁵ where the Court held that procedural due process entitled welfare recipients to an evidentiary hearing prior to termination of benefits. The Court, characterizing welfare entitlements as a property interest in the recipient,⁹⁶ thus held that "due process require[d] an adequate hearing [meeting ordinary standards] before termination of welfare benefits."⁹⁷ Recognizing the peculiar dependency of welfare recipients, the Court noted that "[a]gainst the justified desire to protect public

86. Note, *Defining the Scope of the Due Process Right to Protection: The Fourth Circuit Considers Child Abuse and Good Faith Immunity*, 70 CORNELL L. REV. 940, 950 (1985).

87. See *id.* at 950-54.

88. Reidinger, *supra* note 41, at 50; see *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

89. Note, *supra* note 42, at 687.

90. "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (due process clause); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (equal protection clause); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (ninth amendment)).

91. *DeShaney v. Winnebago Co. Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987); see also *DeShaney*, 489 U.S. at 203.

92. *Monroe v. Pape*, 365 U.S. 167, 176 (1961) (emphasis in original).

93. *Id.* at 203.

94. Comment, *supra* note 8, at 1063.

95. 397 U.S. 254, 261 (1970).

96. *Id.* at 262.

97. *Id.* at 261.

funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance."⁹⁸

As the case law has developed, the protections of procedural due process attach when the state deprives a person's interest cognizable as either "liberty" or "property."⁹⁹ Property interests are created by court construction of statutes conferring a benefit upon a particular class of people which limits the discretion of local officials.¹⁰⁰ "Because the due process clause defines 'property' in light of the expectation created by the state, . . . property interests may exist in promises to provide services that would not be considered property in a more traditional sense of the term" simply by virtue of the individual's reliance upon the state.¹⁰¹

In an entitlement context, it would seem Joshua DeShaney would have benefitted from the attachment of procedural due process rights by reliance upon the relevant state law which "direct[ed] citizens and other governmental entities to depend on local departments of social services . . . to protect children from abuse."¹⁰² Under this analysis, the due process clause would not impose a duty upon the state to act by virtue of a "special relationship," but rather would require the state to act with due care or perhaps within a procedural framework in order to deprive a benefit conferred and relied upon.¹⁰³

Under *Goldberg v. Kelly*, "consideration of what procedures due process may require . . . must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."¹⁰⁴ In *Goldberg*, the Court concluded that a hearing was dictated by due process because

[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.¹⁰⁵

With such reasoning underlying the principle entitlement case, it seems the Court may accept such an approach for situations such as the one involved in *DeShaney*. Although the *DeShaney* Court specifically refused to consider whether Joshua had an entitlement to protective services because of an error in the pleadings,¹⁰⁶ certainly, in relative terms, the "stakes" are higher for a child seeking protection from fatal abuse than for an adult welfare recipient.

98. *Id.*

99. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (discussing factors to be considered in granting additional procedural safeguards such as the interest itself and the risk of erroneous deprivation of the interest).

100. Comment, *supra* note 8, at 1069.

101. *Id.* at 1065.

102. *DeShaney*, 489 U.S. at 208 (Brennan, J., dissenting).

103. Comment, *supra* note 8, at 1064.

104. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

105. *Id.* at 266 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 904-05 (1968) (the district court's opinion in this case)).

106. *DeShaney*, 489 U.S. at 195 n.2.

Unfortunately, this approach is not curative of all state inaction problems. It only provides additional protection for existing rights.¹⁰⁷ However, this approach could considerably calm the nerves of those frightened by the prospect of the state "buying itself a lawsuit." For instance, police laws which designate no particular class to be serviced do "not create a property interest for a particular individual that could be invoked in a section 1983 case."¹⁰⁸ A member of the public would still be denied any constitutional redress for police indifference to obvious dangers facing him or her. In addition, procedural safeguards alone may not prevent poor decisionmaking on the part of the administrative body. The procedures may be found inadequate, thus a due process violation, *only* if the correct choice was obvious.¹⁰⁹ As such, a procedural due process approach continues to rely upon the administrator's "good faith . . . [a] troublesome posture in a . . . system that depends heavily on judicial review"¹¹⁰

IV. CONCLUSION

An analysis of *DeShaney* and its predecessors reflects the troublesome task of reconciling the concept of "state action" with that of state negligence. By rejecting the noncustodial "special relationship," the Court avoided the further entanglement of tort and constitutional principles. As such, the Constitution now provides redress only for captives of the state, or to citizens upon which it inflicts reckless or intentional harm. It is a charter for a benign if not ineffective government. Fortunately, the Court has left open the option of using an entitlement approach as a remedy for the victims of state indifference. This would remove state conduct from an action-inaction context and may save future Joshua DeShaneys from death, or perhaps worse, a lifetime of dulled, motionless sensation. Procedural first and foremost, this new protection would not be a panacea for all nonfeasance problems, but may provide an acceptable framework for the Rehnquist Court.

Breaden Marshall Douthett

107. J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 35-36 (1985).

108. Comment, *supra* note 8, at 1069-70.

109. *Id.* at 1071.

110. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge*, 44 U. CHI. L. REV. 28, 58 (1976).

